

STATE OF MICHIGAN
COURT OF APPEALS

SUE ANN MARIE ANSARI,

Plaintiff-Appellee,

v

EDWARD D. GOLD, PATRICIA ERHART
NESSEL and BUTZEL LONG, P.C.,

Defendant-Appellant.

UNPUBLISHED
February 14, 2006

No. 263920
Oakland Circuit Court
LC No. 04-056973-NM

Before: Donofrio, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

Defendants appeal by leave granted from the trial court's order partially denying defendants' motion for summary disposition predicated on the defense of release. Because plaintiff failed to tender back the consideration exchanged for the release, she may not maintain an action in derogation of the release and, we reverse.

Defendants first argue that the trial court erred by denying their motion for summary disposition brought pursuant to MCR 2.116(C)(7), when it held that the release signed by plaintiff is unenforceable according to MRPC 1.8(h). Defendants conclude that in the absence of a tendering back of the consideration given for the release, plaintiff may not proceed in derogation of the release regardless of MRPC 1.8(h).

This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Under MCR 2.116(C)(7), a party may move for dismissal of a claim on the ground that a claim is barred because of a release. Neither party is required to file supportive material. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). Any documentation that is provided to the court, however, must be admissible evidence and must be considered by the court. MCR 2.116(G)(5). The plaintiff's well-pleaded factual allegations, affidavits, or other admissible documentary evidence must be accepted as true and construed in the plaintiff's favor, unless contradicted by documentation submitted by the movant. *Maiden, supra*.

The law governing summary disposition based on a release has been summarized as follows:

Summary disposition of a plaintiff's complaint is proper where there exists a valid release of liability between the parties. MCR 2.116(C)(7). A release of liability is valid if it is fairly and knowingly made. The scope of a release is governed by the intent of the parties as it is expressed in the release.

If the text in the release is unambiguous, we must ascertain the parties' intentions from the plain, ordinary meaning of the language of the release. The fact that the parties dispute the meaning of a release does not, in itself, establish an ambiguity. A contract is ambiguous only if its language is reasonably susceptible to more than one interpretation. If the terms of the release are unambiguous, contradictory inferences become 'subjective, and irrelevant,' and the legal effect of the language is a question of law to be resolved summarily. [*Wyrembelski v City of St Clair Shores*, 218 Mich App 125, 127; 553 NW2d 651 (1996) (citations omitted).]

The rules regarding the interpretation of a release are also well established. "The scope of a release is controlled by the language of the release, and where . . . the language is unambiguous," it is construed as written. *Adair v State of Michigan*, 470 Mich 105, 127; 680 NW2d 386 (2004), citing *Batshon v Mar-Que Gen Contractors, Inc*, 463 Mich 646, 650; 624 NW2d 903 (2001). "A release is knowingly made even if it is not labeled a 'release,' or the releasor fails to read its terms, or thought the terms were different, absent fraud or intentional misrepresentation designed to induce the releasor to sign the release through a strategy of trickery." *Xu v Gay*, 257 Mich App 263, 272-273; 668 NW2d 166 (2003), citing *Dombrowski v City of Omer*, 199 Mich App 705, 709-710; 502 NW2d 707 (1993). "A release is not fairly made if '(1) the releasor was dazed, in shock, or under the influence of drugs, (2) the nature of the instrument was misrepresented, or (3) there was other fraudulent or overreaching conduct.'" *Id.* at 273.

The release language in this case provides:

In consideration of our agreement to reduce our fees in the amount of \$21,665.54 and our agreement to disburse to you a portion of the funds being held in our trust account, which could have been applied in full payment of our fees, you have agreed to acknowledge our continuing right to a lien against the amounts due you from Shapoor Ansari and to release the firm of Butzel Long and its individual attorneys from any claims you may have arising from any services performed by them.

According to the plain terms of the release, plaintiff released *any* claims she may have arising from *any* services performed by Butzel Long and its individual attorneys. The term "any" is synonymous with "all," and the term "all" is the broadest classification, leaving no room for exceptions. *Romsak v Oppen*, 234 Mich App 512, 515-516; 594 NW2d 853 (1999). Plaintiff, therefore, released her claims against defendants that arose out of their services in the underlying action.

Plaintiff, however, argues that the release is invalid under the Michigan Rules of Professional Conduct. In this respect, MRPC 1.8(h) states:

A lawyer shall not:

- (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement; or
- (2) settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

The issue, therefore, is whether MRPC 1.8(h) can be used to render the release unenforceable.

As a threshold matter, the trial court's reliance on MRPC 1.8(h)(1) is misplaced. MRPC 1.8(h)(1) applies to agreements "prospectively limiting" a lawyer's liability to the client. Thus, by its plain terms, MRPC 1.8(h)(1) applies only to agreements signed before any potential negligence committed during the representation. Because the release signed by plaintiff was directed to past performance and was signed after the trial court entered the judgment of divorce in the underlying action, clearly, MRPC 1.8(h)(1) is inapplicable here.

Furthermore, a violation of the MRPC, in and of itself, does not give rise to a cause of action. MRPC 1.0(b) provides, in pertinent part, that "the rules do not, however, give rise to a cause of action for . . . damages caused by failure to comply with an obligation or prohibition imposed by a rule." Plaintiff, however, argues that her cause of action is not based on the MRPC, but rather, her claim is based on negligence and the MRPC provides a basis to defeat defendants' *defense* to plaintiff's negligence claim (i.e., the "release").

In this regard, even assuming the trial court had looked to MRPC 1.8(h)(2), rather than subsection (1), and assuming *arguendo* that defendants violated that rule, the issue remains as whether a violation of the MRPC can be used to render the release unenforceable. In general, the rationale found in *Evans & Luptak, PLC v Lizza*, 251 Mich App 187; 650 NW2d 364 (2002), applies, wherein this Court refused to enforce a referral fee agreement, on public policy grounds, because the agreement violated the MRPC. *Id.* at 197. The *Evans* Court noted that "Michigan courts have traditionally refused to enforce contracts that contravene public policy" and chose to join "the weight of authority and hold that courts should not enforce unethical fee agreements." *Evans, supra* at 195. Thus, according to *Evans*, a contract that violates the MRPC is unenforceable on public policy grounds.

However, what distinguishes this case from *Evans* is the "tender back rule." Even assuming MRPC 1.8(h)(2) is at issue here, plaintiff's failure to tender back the consideration she received in exchange for her signing the release bars her claims in derogation of the release. There is no dispute that plaintiff has failed to, or at anytime offered to, tender back to defendants the proceeds of the settlement. Michigan law requires the tender back of settlement proceeds before one can initiate suit. Our Supreme Court, in *Stefanac v Cranbrook Education Community (After Remand)*, 435 Mich 155, 177; 458 NW2d 56 (1990), stated, in relevant part:

The very essence of a release and settlement is to avoid litigation. The plaintiff is not entitled to retain the benefit of an agreement and at the same time bring suit in contravention of the agreement.

“[T]he plaintiff must tender the recited consideration before there is a right to repudiate the release. . . . The only recognized exceptions in Michigan are a waiver of the plaintiff’s duty by the defendant and fraud in the execution.” *Stefanac, supra* at 165; see also, *Collucci v Eklund*, 240 Mich App 654, 659; 613 NW2d 402 (2000). The record is devoid of any evidence that defendants ever waived plaintiff’s duty to return the money given in exchange for the release.

Further, plaintiff’s argument that there was fraud in the execution of the agreement is without merit. “Fraud in the execution” occurs when a party is made to believe that he is signing something other than the release. *Stefanac, supra* at 165-166. Plaintiff did not testify that she was unaware of or did not understand the nature of the release; rather, plaintiff admitted that she read the release, but was so preoccupied about receiving the settlement proceeds that she disregarded the release language and made no effort to understand it. Such is insufficient to establish fraud in the execution, and thus, plaintiff’s claim does not fall within the fraud in the execution exception. *Collucci, supra* at 659. Because plaintiff has not tendered back the settlement proceeds (i.e., “in consideration of our agreement to reduce our fees in the amount of \$21,665.54 and our agreement to disburse to you a portion of the funds being held in our trust account, which could have been applied in full payment of our fees, you have agreed to . . . release the firm of Butzel Long and its individual attorneys from any claims you have arising from any services performed by them.”), she has no right to challenge the release. *Stefanac, supra* at 165. Therefore, defendants’ alleged violations of the MRPC are insufficient to bar enforcement of the release in the instant case. The trial court erred by not dismissing plaintiff’s action as a matter of law. MCR 2.116(C)(7).

Reversed.

/s/ Pat M. Donofrio
/s/ William B. Murphy
/s/ Kirsten Frank Kelly